

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE SESSION, 1995

FILED

April 24, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

WILLARD BILL CARPENTER,)

Appellant,)

v.)

STATE OF TENNESSEE,)

Appellee.)

No. 0301-9411-CR-00425

Hamblen County

Honorable James E. Beckner, Judge

(Post-Conviction)

(Underlying Conviction:
Aggravated Sexual Battery)

For the Appellant:

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OPINION FILED: _____

AFFIRMED

Joseph S. Daniel
Special Judge _____

OPINION

After a complete evidentiary hearing on the Appellant's Post Conviction Petition, the trial court dismissed the petition. The Appellant seeks a review of the trial court's action and claims that the trial court's determination is in error and should be reversed. We have considered the claims of the Appellant and find that the trial court correctly decided the issues presented.

Willard Bill Carpenter, the Appellant, was convicted by way of a jury trial of one count of Aggravated Sexual Battery, Tenn. Code Ann. § 39-13-504, March 12, 1991. A sentence was imposed of ten (10) years as a Range I, Standard Offender for this conviction. This conviction was appealed and affirmed by this court in the case of State of Tennessee v. Carpenter, 03C01-9108-CR-0026 (Tenn. Crim. App. 1992).

In this Post-Conviction Relief Petition the Appellant raises two issues for our consideration. He asserts that the trial court erred in failing to grant a new trial in his case based on the recanting of the trial testimony of R. H.¹ and that he had ineffective assistance of trial counsel. The Appellant asserts that the trial counsel was ineffective for failing to investigate and discover the unreliability of R. H.'s testimony before the trial or within the time necessary to ask for a new trial; that trial counsel was ineffective in failing to call character witnesses; and finally, the Appellant contends that he failed to have the opportunity to participate in his own defense in a meaningful way because he is hearing impaired and trial counsel was ineffective in failing to seek special

¹ It is our policy in sexual offense cases to identify minors involved only by initials.

consideration from the court in order to compensate for that impairment.

It is important to evaluate these claims in light of the trial testimony and the Post-Conviction Petition testimony. Two witnesses testified as to the assault, C.M. and R. H. C. M. was a child of eleven years old and was the subject of the assault. She testified that the Appellant is her uncle and that on the night in question she and her cousin, R. H., spent the night at the Appellant's home. During the evening the Appellant disrobed and they watched a dirty movie on television. Later that same evening the appellant took C. M. back to his bedroom and exposed his penis to her. He then undressed her. C. M., in her trial testimony, described the assault in these words, "And then he kissed me on the cheek and then he put me on the bed. And then he put his leg across me, and he braced himself with his hand, and he took his other hand and he rubbed it up and down me. When he got done, I saw some white cream come out." Later in C. M.'s cross examination she clarifies this statement and explains that "it" refers to the Appellant's private part that was rubbed on her private part.

At trial R. H. testified and confirmed that on the night in question he and C.M. had spent the night at the Appellant's house. R. H. testified that the Appellant wanted to buy beer and rent a dirty movie for a party but had no money and that they instead had watched a dirty movie on Cinemax. During the evening R. H. testified that he observed the Appellant undressed and heard him tell C. M. that he wanted to show her something in his bedroom. Thereafter, when C. M. and the Appellant were in the bedroom, R. H. got up from his seat in the living room and went to the bedroom door where he peeked through the door and saw the Appellant on top of C. M. bracing himself. On this occasion the Appellant was unclothed and C. M. was partially disrobed with her shirt removed but with her panties on. R. H. testified that the appellant was "rubbing it -- trying to rub it up in her private spot and she was laying

down on her back."

During the Post-Conviction Petition evidentiary hearing R. H. testified in support of the Appellant's petition and recanted some portions of his trial testimony. At this hearing R. H. indicated that they had watched a movie on television but it was not dirty. R. H. recanted his prior testimony that the appellant was completely unclothed when he was observed on top of C. M. and at the post-conviction proceeding testified that the Appellant had his underwear on when this occurred with the Appellant's touching of C. M. being limited to rubbing her stomach as opposed to his trial testimony of rubbing his private part on the victim's private area. In the conclusion of R. H.'s testimony he asserts that the only contact the Appellant had with C. M. when he was completely unclothed was with her breast.

State v. Herndon, 03C01-9303-CR00098 (Tenn. Crim. App. 1994) states the test for granting a new trial in cases involving recanted testimony. This test is as follows: (1) Is the trial judge reasonably well-satisfied that the testimony given by a material witness was false and that the new testimony is true; (2) Was the defendant reasonably diligent in discovering the new evidence, or surprised by false testimony, or unable to know of the falsity until after the trial; and (3) Might the jury have reached a different conclusion had the truth been told. See also State of Tennessee v. Tommy Ashby, (Tenn. Crim. App., Jackson, November 27, 1985), Tatum, J. dissenting (noting that while no single Tennessee case had previously set out the complete standard, several cases led to the conclusion that this standard, drawn from Larrison v U.S., 24 F.2d 82, 87-88 (7th Cir. 1928), is applied by the courts of Tennessee.)

Considering the post-conviction proceeding testimony of R. H., we cannot conclude that the trial judge was in error in finding that the above standard was not met. This testimony does not appear to be materially false or

substantially different from that presented at trial. More importantly, the later testimony of R. H. would not give rise to a significant probability that the jury would have reached a different conclusion in the Appellant's case considering the elements of the offense. Aggravated Sexual Battery, Tenn Code Ann. § 39-13-504 (a), is defined as unlawful sexual contact with a victim . . . accompanied by any of the circumstances listed in Tenn Code Ann. § 39-13-502(a), one of those circumstances being that the victim was under age 13. "Sexual contact" includes the intentional touching of the victim's intimate parts or the clothing covering the immediate area of the victim's intimate parts, if the purpose is for sexual arousal or gratification. Tenn. Code Ann. § 39-13-501 (6). "Intimate parts" include the primary genital area, groin, inner thigh, buttock or breast of a human being. Tenn. Code Ann. § 39-13-501 (2). Using these definitions it is clear that the trial and the post conviction proceeding testimony of R. H. would make out the offense for which the Appellant stands convicted. Therefore, we find that the claim that a new trial should be granted because of recanted testimony is without merit.

Considering the Appellant's claim of ineffective assistance of counsel, the trial court held an evidentiary hearing and determined that trial counsel had made a thorough investigation of the case and had spent a great deal of time in the preparation of the case. Counsel filed numerous motions and had hearings of those motions in advancing the defense of the Appellant. The trial court found that the trial counsel's cross examination was effective and impeached the testimony of R. H. In reaching that conclusion the trial court observed that presenting family character witnesses rarely was effective or persuasive.

In addition to his other complaints, the Appellant asserts that his trial counsel was ineffective for failing to have the trial court make provisions for his hearing impairment. The Appellant contends that he could not hear much of the proceeding and that this deprived him of any reasonable opportunity to

participate in his own defense. Undoubtedly if the proof established that the Appellant had such a substantial hearing problem as to not be able to understand and participate in his trial and his impairment was not addressed after being brought to the attention of trial counsel and/or the court, such action would deprive the appellant of a fundamental constitutional due process right. However, in this case the record reflects no action on the part of the Appellant during his trial that would have indicated to counsel or the court that he was not able to hear the testimony of the witnesses appearing even after being admonished to inform the court if he could not hear the questions asked. The Appellant testified in his own defense without the record reflecting any difficulty. The probation report reflected at the trial level that the Appellant had indicated to the probation officer other health-related problems but failed to indicate that he possessed any hearing problems.

In reviewing the Appellant's claim of ineffective assistance of counsel, this court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936(Tenn. 1975). To prevail on a claim of ineffective assistance of counsel, an Appellant "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).

In a post-conviction proceeding, the Petitioner must prove the allegations contained in his petition by a preponderance of the evidence. State v. Kerley, 820 S.W.2d 753 (Tenn. Crim. App. 1991); Oliphant v. State, 806 S.W.2d 215 (Tenn. Crim. App. 1991). On appeal, the findings of the trial court are

conclusive and will not be disturbed unless the evidence contained in the record preponderates against them. Rhoden v. State, 816 S.W.2d 56 (Tenn. Crim. App. 1991); Brooks v. State, 756 S.W.2d 288 (Tenn. Crim. App. 1988).

The record in this case supports the trial court's conclusion that the counsel was effective. Therefore, this issue is overruled. Accordingly, we affirm the dismissal of the Appellant's Post-Conviction Relief Petition.

JOSEPH S. DANIEL, SPECIAL JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

NOT PARTICIPATING
JERRY SCOTT, JUDGE